

October 8, 2002

Memo To Counsel Re: Microsoft Antitrust Litigation
MDL-1332; "Competitor Track"

Dear Counsel:

I have reviewed your competing proposals regarding deposition hours and the discovery schedule.

My rulings are as follows.

Deposition Hours

	<u>Party</u>	<u>Non-party</u>	<u>Total</u>
Netscape	300 (estimated)	200 (estimated)	500
Microsoft	400 (estimated)	200 (estimated)	600
Be	125 (estimated)	125 (estimated)	250
Microsoft	125 (estimated)	125 (estimated)	250
Burst ¹	150 (estimated)	150 (estimated)	300
Microsoft	150 (estimated)	150 (estimated)	300
Sun	550 (estimated)	200 (estimated)	750
Microsoft	550 (estimated)	200 (estimated)	750

As indicated in this chart, I have only estimated the allocations between party and non-party depositions. I have shown these figures to reflect my line of thinking that led to the total limits I am establishing. Any party may reallocate hours between party to non-party depositions (and vice versa), provided that they do not exceed the totals.

In setting my totals in each case, I have taken into account the magnitude of the relief sought, the potential impact of the outcome of the litigation, the fact that Microsoft employees have already been extensively deposed in related litigation on issues that to some extent overlap those presented here, and

¹The hours I am setting in Burst (both for Burst and Microsoft) are intended to cover the anti-trust issues and also the patent issues, to the extent that there is an overlap between the two. I will, at the parties request, consider whatever additional deposition hours they believe are necessary to address pure patent issues.

the principle of parity.

Page Two

It goes without saying that I expect plaintiffs' counsel to cooperate with one another and with Microsoft to avoid covering ground that has already been thoroughly explored in related litigation, to prevent any duplicative and repetitive questioning on common issues, and, insofar as reasonably possible, to make arrangements for each witness to be deposed only once. I have not yet decided whether to enter an order establishing a formal deposition protocol but I will definitely do so if necessary to establish a fair and orderly process.

Discovery Schedule in Netscape, Be, and Burst

October 17, 2003	Close of Fact Discovery
October 20, 2003	Plaintiffs' expert reports due
December 19, 2003	Microsoft's expert reports due
January 16, 2004	Plaintiffs' rebuttal expert reports due
February 20, 2004	Close of expert discovery

I realize that this schedule results in the completion of discovery in February, 2004, rather than in December, 2003, the target date I previously set. However, I believe that expert reports should be exchanged sequentially, not simultaneously, after fact discovery has been completed. I do not think that it is feasible to set a schedule incorporating those factors and calling for the completion of all discovery in December, 2003.

One final comment. Setting deposition hour limits and establishing a discovery schedule is an art, not a science, and I do not presume that my rulings are perfect. As is evident, in many respects I have taken a middle ground between your proposals. In at least one instance - in setting the number of deposition hours in the Netscape case - I am closer to the position advocated by Microsoft than I am to the position advocated by Netscape (although I am granting Netscape much of the "parity" it seeks). In making my decision on this point, I have been influenced by the large monetary recovery Netscape is seeking. In any event, although I hope you find my resolution of the issues to be satisfactory, in case the limits and schedule I have set causes a particular problem that I have not perceived, any of you may seek a reconsideration of my rulings by submitting a letter or motion on or before October 15, 2002.

Despite the informal nature of this ruling, it shall constitute an Order of Court, and the Clerk is directed to docket it accordingly.

Very truly yours,

/s/

J. Frederick Motz
United States District Judge

cc: Court File